

REMARKS

Claims 40 and 52 have been amended to correct minor typographical errors. Claims 48-51 and 54 have been withdrawn. No claims have been added or cancelled in this Reply. Accordingly, claims 40-47 and 52-53 are pending.

The Examiner has grouped the claims for restriction purposes as follows:

- I: Claims 40-47 and 52-53, drawn to determining whether noise is present, classified in class 370, subclass 260.
- II: Claims 48-51 and 54, drawn to determining valid speech, classified in class 379, subclass 202.01.

The Applicant hereby elects, with traverse, to continue the prosecution of the Group I, i.e., claims 40-47 and 52-53. Applicant reserves the right to petition the Director to review this restriction requirement. Alternatively, non-elected claims may be pursued in a divisional application to be filed prior to the issuance or abandonment of this application.

The Examiner has asserted “the different inventions have different designs and modes of operation. Invention I is for determining noise on a port while Invention II is for determining valid speech.” Restriction Requirement dated May 27, 2009 at p. 2.

Applicant asserts this election/restriction requirement is improper for at least the reasons set forth below. The Examiner is reminded, “[e]very requirement to restrict has two separate aspects: (A) the reasons (as distinguished from the mere statement of conclusion) why each invention as claimed is either independent or distinct from the other(s); **and** (B) the reasons why there would be a serious burden on the examiner if restriction is not required, i.e., the reasons for insisting upon restriction therebetween...” M.P.E.P. § 808 (emphasis added).

The Examiner simply provides the following form paragraph from the M.P.E.P., without **the required** explanation or reasons why there would be serious burden on the Examiner.

- (a) the inventions have acquired a separate status in the art in view of their
different classification;
- (b) the inventions have acquired a separate status in the art due to their
recognized divergent subject matter;

(c) the inventions require a different field of search (for example, searching different classes/subclasses or electronic resources, or employing different search queries);

(d) the prior art applicable to one invention would not likely be applicable to another invention;

(e) the inventions are likely to raise different non-prior art issues under 35 U.S.C. 101 and/or 35 U.S.C. 112, first paragraph.

Restriction Requirement dated May 27, 2009 at pp. 2-3.

The Examiner is reminded “[b]efore making a restriction requirement after the first action on the merits, the examiner will consider whether there will be a *serious burden* if restriction is not required.” M.P.E.P. § 811 (emphasis added). However, Applicant submits that no serious burden exists because the Examiner has already performed a search and issued two Office Actions on the merits for this Application. The claims have not been amended in any significant way since the claims were searched. The Examiner has made no effort to explain why now a serious burden would exist whereas one did not apparently exist before. “The examiner, in order to establish reasons for insisting upon restriction, *must explain* why there would be a serious burden on the examiner if restriction is not required.” M.P.E.P. § 808.02 (emphasis added). The Examiner has not made any explanation of serious burden. Therefore, the Examiner has not met the higher burden of insisting on a restriction after a first action on the merits. For at least these reasons, Applicant submits that this restriction requirement is improper and should be withdrawn.

Applicant invites the Examiner to call the undersigned with respect to any questions pertaining to this application (832/446-2445).

Respectfully submitted,

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June 26, 2009
Date

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